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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 TERENCE VALENZUELA, M.D., )

9 Plaintiff, )

10 vs. )

11 HARVEY W. MEISLIN, M.D., et al., )

12 Defendants. )  
13

No. CIV 08-232-TUC-CKJ

**ORDER**

14 Pending before the Court are Plaintiff's Motion for Partial Summary Judgment [Doc.  
15 # 25] and Defendants' Cross-Motion for Summary Judgment [Doc. # 28]. In Plaintiff's  
16 response, Plaintiff requests oral argument. However, the Court finds this matter is suitable  
17 for decision without oral argument. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171  
18 F.3d 1197, 1200 (9th Cir. 1999) (explaining that if the parties provided the district court with  
19 complete memorandum of law and evidence in support of their position, ordinarily oral  
20 argument would not be required).

21 *Factual and Procedural Background*

22 Plaintiff Terence Valenzuela, M.D. ("Dr. Valenzuela"), asserts that he has been  
23 employed by the State of Arizona Board of Regents ("ABOR") for teaching and research at  
24 the University of Arizona College of Medicine ("COM") since 1985. Dr. Valenzuela also  
25 asserts that he was dually employed by University Physicians Incorporated ("UPI") for  
26 clinical practice since 1985. UPI subsequently changed its name to University Physicians  
27 Healthcare, Inc. ("UPH"). Defendants assert that Dr. Valenzuela's employment with the  
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1 University of Arizona (“the University”) is conditioned upon his being a member of UPH.

2 Defendant Harvey W. Meislin, M.D. (“Dr. Meislin”), was employed by ABOR as  
3 head of the Department of Emergency Medicine (“DEM”) in COM at the time of the acts  
4 complained of in this action. Defendant Keith Joiner, M.D. (“Dr. Joiner”), was employed  
5 by ABOR as Dean of COM at the time of the acts complained of in this action.

6 In 1991 Dr. Valenzuela was awarded tenure as an Associate Professor at COM; Dr.  
7 Valenzuela was promoted to Professor at COM in 1997.<sup>1</sup> Dr. Valenzuela’s employment  
8 responsibilities with ABOR as a tenured Professor at COM require him to provide teaching  
9 and research services; this included the teaching of residents, non-residents, and nurse  
10 practitioner students. Dr. Valenzuela’s notices of appointment provide that he is subject to  
11 the ABOR conditions of Faculty Service and the University Handbook for Appointed  
12 Personnel (“UHAP”). The UHAP states:

13 An individual who holds a tenured appointment is assured that the President shall  
14 offer an appointment to that individual for each succeeding fiscal or academic year  
15 until retirement, resignation, dismissal for just cause, or termination for budgetary  
16 reasons or for educational policy change.

17 UHAP, § 3.11.04.

18 Dr. Joiner testified that “there is no definition of the financial commitment for tenure  
19 at the University of Arizona in the [COM] or in any other department or college.”  
20 Defendants’ Statement of Facts (“DSOF”), Ex. 3, 12:1-4.

21 Dr. Valenzuela asserts that, when he was tenured, he had a state salary line assigned  
22 to his tenured position to compensate him for the teaching and research services he performs  
23 for ABOR at COM. Dr. Valenzuela asserts that he was compensated by UPI for the clinical  
24 services he provided for UPI; he was subsequently compensated by UPH for the clinical  
25 services he provided as an employee of UPH. Dr. Valenzuela asserts that neither UPI nor

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26 <sup>1</sup>Under the policies of the ABOR, tenure is the employment status awarded by a  
27 president to a faculty member who has demonstrated excellence in teaching, research, and  
28 service in accordance with criteria established by each university. The status of tenure  
creates a legitimate claim of entitlement to continued employment unless the tenured faculty  
member is dismissed or released in accordance with ABOR Policy 6-201H., J., or K.

1 UPH have compensated him for the teaching and research services he provided as a tenured  
2 Professor employed by ABOR at COM. Defendants asserts that Dr. Valenzuela is not  
3 qualified to testify regarding the use of UPH funds or limitations thereon and that UPH  
4 dollars have always been used to support faculty activities, including teaching, that are  
5 interrelated. Dr. Valenzuela asserts that he continued to have a state paid salary for the  
6 teaching and research services he performed for ABOR as a tenured Professor at COM  
7 through June 30, 2007. Defendants asserts that Dr. Valenzuela did not have a state salary  
8 line assigned to him in perpetuity and that state support was not tied to tenure.

9 Defendants further assert that the use of state dollars to support Dr. Valenzuela's  
10 salary was up to the discretion of the department head. Indeed, Dr. Joiner testified at  
11 deposition that COM faculty's payment for teaching responsibilities is a combination of state  
12 funds, UPH fund, grant funds, and other additional sources. However, "there's no precise  
13 dividing line oftentimes between delivering clinical care and teaching so that it's understood  
14 that – that dollars are fungible and that funds can be used for different purposes." DSOF, Ex.  
15 3, 9:20-24. Similarly, Dr. Meisner testified that teaching faculty members may be paid with  
16 UPH funds. DSOF, Ex. 2, 21:12-14

17 Dr. Valenzuela testified at deposition that he understood that the state dollar portion  
18 of his salary was a relatively small percentage of his salary; Dr. Valenzuela further testified  
19 that he had never been promised a specific sum of state dollars for any particular year and  
20 that he did not know of any University or ABOR policy that guarantees him a particular sum  
21 of state dollars or that a particular percentage of his salary would come from state dollars.

22 When Dr. Meislin became head of the DEM in 2002-03, there was no formula for  
23 distributing the department's allotment of state dollars, so Dr. Meislin unilaterally decided  
24 to distribute it mostly to tenured faculty, with a small amount going to tenure-track faculty,  
25 pending the development of a distribution plan by the Dean. In 2002-03, Dr. Valenzuela saw  
26 an increase in the amount of state dollars used to pay his salary, though his overall  
27 compensation did not increase.

28 In or around 2005, the COM began to implement the Arizona Med curriculum for

1 medical students and to develop an approach to pay faculty to teach the curriculum to  
2 medical students. On May 16, 2006, Dr. Meislin informed the DEM faculty of a COM  
3 faculty meeting in which Dr. Joiner related a plan to reallocate state funding. Dr. Meislin  
4 outlined the plan and said, “What this means is that significant state funding will go to the  
5 faculty that do the undergraduate and graduate level teaching—that is you!” DSOF, Ex. 10.  
6 In a May 17, 2006, e-mail, Dr. Valenzuela asked, “What do you mean by ‘significant?’” *Id.*  
7 Dr. Meislin responded, via e-mail, “\$\$\$[.]” *Id.*

8 During the development of the distribution plan, Dr. Joiner sent memos to the entire  
9 COM describing the process.

10 On December 13, 2006, Dr. Meislin distributed an attachment showing the COM  
11 Teaching Effort Metrics to the DEM faculty. Dr. Valenzuela received the Teaching Effort  
12 Metrics and he understood that it related to teaching the Arizona Med curriculum to medical  
13 undergraduates and graduate students and he also understood there would be dollars for those  
14 faculty who chose to do it, but he was not interested.

15 On February 6, 2007, Dr. Meislin sent Dr. Valenzuela an analysis of the Arizona Med  
16 teaching metrics and stated, “The Dean’s effort to redistribute state dollars to Departments  
17 and their metric developed for distribution of those funds necessitates DEM to begin the  
18 process of redistributing DEM state dollars according to that analysis. Our current style of  
19 using the state dollars to fund tenured faculty will transition to the style developed by the  
20 COM.” DSOF, Ex. 12.

21 Dr. Valenzuela testified at deposition that he was on notice in February 2007 that he  
22 was in danger of losing state funding and that Dr. Meislin, as department head, had the power  
23 to do what he wanted with the state dollars and other funds the department received. On  
24 February 20, 2007, Dr. Valenzuela responded to an inquiry by Dr. Chad Viscusi about the  
25 reallocation plan by stating, in pertinent part, “You read correctly that [Dr. Meislin] can  
26 pretty much do whatever he wants with much of the ‘new’ state money the department will  
27 receive for teaching. So what? We’ve always done it that way.” DSOF, Ex. 13.

28 On April 26, 2007, the department’s business coordinator sent Dr. Valenzuela an e-

1 mail stating that, beginning on July 1, 2007, the DEM would distribute its state dollars  
2 according to the COM plan and that the state dollars that had previously been allocated to  
3 him would be reallocated to support the Arizona Med teaching effort. On April 27, 2007,  
4 Dr. Valenzuela responded, “Don’t think the previously state dollars in Emergency Medicine  
5 will make much of a dent since we didn’t have many” and further commented that if the  
6 department collected the revenue it was owed, “everything should be fine.” DSOF, Ex. 14.  
7 On April 29, 2007, Dr. Valenzuela again responded to the business coordinator stating, “Did  
8 not Harvey have the stones to send these emails himself?” DSOF, Ex. 14.

9 Dr. Valenzuela asserts in his affidavit that, when he inquired of his COM Department  
10 Head in 2007 regarding the decision to deprive him of the entire salary for the teaching and  
11 research services he performs for ABOR as a tenured Professor at COM, he was told by Dr.  
12 Meislin that the decision was made by the Dean. Dr. Valenzuela further states in his affidavit  
13 that Dr. Joiner was the Dean of COM in 2007. In his deposition, Dr. Joiner testified that the  
14 department heads determine what faculty salaries are going to be and whether to give any  
15 state salary to department members.

16 Dr. Valenzuela testified at deposition that he opted not to participate in the Arizona  
17 Med teaching effort. He states, in his affidavit, that he was given no notice or opportunity  
18 to respond prior to the decision being made to deprive him of his entire salary for the  
19 teaching and research services he provides for ABOR as a tenured Professor at COM.  
20 However, at his deposition, Dr. Valenzuela testified that he knew he could have filed a  
21 grievance but did not file one because he thought it would be futile.<sup>2</sup> Defendants assert that  
22 Dr. Valenzuela was given notice and multiple opportunities to respond.

23 Under the plan proposed by the COM and adopted by the DEM for the distribution  
24 of state dollars, the department received a lump sum of state dollars and allocated 70 percent  
25 of it for faculty who participated in the Arizona Med teaching effort and 30 percent of it for  
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27 <sup>2</sup>Dr. Valenzuela testified at deposition that he filed a grievance on a different issue  
28 regarding his compensation and was successful (he received a \$35,000 pay increase).

1 department overhead. The distribution plan provided that the 70 percent dedicated to the  
2 Arizona Med teaching effort would be distributed according to the COM teaching metrics;  
3 the plan provided no state dollars for teaching or training residents.

4 Dr. Valenzuela's notice of reappointment for 2006-2007 provided for a base salary  
5 of \$194,400.<sup>3</sup> Dr. Valenzuela asserts that, effective July 1, 2007, he was deprived of the  
6 entire salary for the teaching and research services he performs for ABOR as a tenured  
7 Professor at COM, although he has continued to be employed by ABOR providing teaching  
8 and research services for ABOR as a tenured Professor at COM. Dr. Valenzuela asserts that,  
9 since July 1, 2007, the only salary Dr. Valenzuela has received has been from UPH for the  
10 clinical services he provides through UPH. Defendants asserts that Dr. Valenzuela's net  
11 salary did not change and that Dr. Valenzuela continued to benefit indirectly from state  
12 dollars. In fact, Defendants assert that Dr. Valenzuela has received his full salary from the  
13 University and that his salary was derived from sources that included UPH. Dr. Valenzuela's  
14 notice of reappointment for 2007-2008 provided for a base salary of \$194,400.<sup>4</sup> Dr.  
15 Valenzuela's notice of reappointment for 2008-2009 provides for a base salary of \$229,000.

16 Dr. Valenzuela asserts that Drs. Meislin and Joiner did not follow the procedures in  
17 ABOR Policy 6-201H., J., or K for his dismissal or release. He further asserts that there was  
18 no good cause to dismiss or release him from his tenured faculty position. Defendants  
19 dispute this assertion to the extent that Dr. Valenzuela claims to have been dismissed or  
20 released from his tenured faculty position.

21 On April 3, 2008, Dr. Valenzuela filed a Complaint against Drs. Meislin and Joiner  
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23 <sup>3</sup>Defendants assert that Dr. Valenzuela's compensation for 2006-2007 was  
24 \$204,222.95, of which \$174,763.89 came from UPH and the rest from a state account.

25 <sup>4</sup>Defendants assert that Dr. Valenzuela received no direct state funding in 2007-2008  
26 but received \$199,564.11 from UPH and \$14,050.00 from another account for a total annual  
27 compensation of \$213,614.11. Dr. Valenzuela asserts that, after July 1, 2007, the funding  
28 he received was from UPH. Dr. Valenzuela asserts that the other account referred to by  
Defendants was also a UPH account ("UPH Kino Resident Teaching). Dr. Valenzuela  
asserts he was a member of the UMC faculty and not a UPH Kino faculty member.

1 alleging unlawful deprivation without due process of his property interest in his tenured  
2 faculty position protected under the Fourth and Fourteenth Amendments of the United States  
3 Constitution.<sup>5</sup>

4 On June 23, 2009, Dr. Valenzuela filed a Motion for Partial Summary Judgment. A  
5 response and reply have been filed. On June 26, 2009, Drs. Meislin and Joiner filed a  
6 Motion for Summary Judgment. A response and reply have been filed.

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8 *Relevant Policies*

9 The parties have discussed various provisions of the ABOR Policy. The ABOR  
10 Policy on the Conditions of Faculty Service provide, *inter alia*:

11 6-212 College of Medicine Faculty

- 12 A. The University of Arizona College of Medicine encompasses two full,  
13 four-year medical-education programs: The University of Arizona College of  
14 Medicine in Tucson (Tucson campus) and The University of Arizona College  
15 of Medicine – Phoenix in partnership with Arizona State University (Phoenix  
16 campus). The College strives to provide health education and patient care to  
17 all Arizonans, in metropolitan and rural areas alike, from the borderlands  
18 Arizona shares with Mexico to Native American communities in the northern  
19 regions of the state.
- 20 B. The faculty status of any paid voting member of the Tucson campus, who  
21 provides health care services, is conditioned upon such health care services  
22 being provided only as a member or employee of University Physicians  
23 Healthcare (UPH), except that no such requirement of membership or  
24 employment with UPH shall be imposed if UPH determines that any such  
25 member of the faculty is ineligible for membership or employment with UPH.  
26 Faculty members who provide health care services solely at a veterans  
27 administration hospital, whose salaries are provided through that entity, are not  
28 required to have membership or employment with UPH.
- 29 C. The faculty status of any paid voting member of the Phoenix campus faculty,  
30 who provides health care services, shall not be conditioned upon such health  
31 care services being provided as a member or employee of any UA-affiliated  
32 faculty practice plan, until such time and unless ABOR determines that a  
33 faculty practice plan for the Phoenix campus should be implemented.

34 Policy 6-212.

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37 <sup>5</sup>Also included as defendants are the spouses of Drs. Meislin and Joiner. An Amended  
38 Complaint including the spouse of Dr. Valenzuela and an Answer to the Amended Complaint  
were subsequently filed.

1 The University's 2000 University Handbook for Appointed Personnel ("UHAP")  
2 provides, *inter alia*:

3 All grievances or complaints by or against appointed personnel shall be filed with and  
4 addressed first by the immediate administrative head of the individual about whom  
5 the grievance or complaint is made. All grievances or complaints shall be filed in  
6 writing no later than 90 days from the date on which the grievant or complainant  
7 becomes aware of the matter which gives rise to the grievance or complaint, except  
8 for compensation.

9 Grievances or complaints regarding compensation shall be filed no later than 30 days  
10 from the date the grievant or complainant receives notice of the matter which gives  
11 rise to the grievance or complaint.

12 The administrative head shall review the grievance or complaint and develop any  
13 factual information required for a decision on the matter. The administrator may  
14 consult with standing committees or appoint a special committee or an individual to  
15 investigate the matter. The administrator shall communicate his or her decision in  
16 writing to the grieving or complaining party and to the party against whom the  
17 grievance or complaint is made, stating the factual basis and reasons for the decision.

18 Within 10 days after receipt of the administrator's decision, the grieving or  
19 complaining party may appeal the decision to the next administrative level.  
20 Additional factual development may be undertaken at the next administrative level if  
21 deemed necessary. The decision at that next administrative level is not subject to  
22 further administrative review except as otherwise provided in this chapter.

23 UHAP, § 6.02.

### 24 *Summary Judgment Legal Standard*

25 Summary judgment may be granted if the movant shows "there is no genuine issue  
26 as to any material fact and that the moving party is entitled to judgment as a matter of law."  
27 Rule 56(c), Federal Rules of Civil Procedure. The moving party has the initial responsibility  
28 of informing the court of the basis for its motion, and identifying those portions of "the  
pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
affidavits, if any," which it believes demonstrate the absence of a genuine issue of material  
fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the moving party has met the initial burden, the opposing party must "go beyond  
the pleadings" and "set forth specific facts showing that there is a genuine [material] issue  
for trial." *Id.*, 477 U.S. at 248, 106 S.Ct. at 2510, internal quotes omitted. The nonmoving  
party must demonstrate a dispute "over facts that might affect the outcome of the suit under



1 the governing law” to preclude entry of summary judgment. *Anderson v. Liberty Lobby Inc.*,  
2 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Further, the disputed facts  
3 must be material. *Celotex Corp.*, 477 U.S. at 322-23. In opposing summary judgment, a  
4 party is not entitled to rely on the allegations of his pleadings, Fed.R.Civ.P. 56(e), or upon  
5 conclusory allegations in affidavits. *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th  
6 Cir. 1992).

7 The dispute over material facts must be genuine. *Anderson*, 477 U.S. at 248, 106  
8 S.Ct. at 2510. A dispute about a material fact is genuine if “the evidence is such that a  
9 reasonable jury could return a verdict for the nonmoving party.” *Id.* A party opposing a  
10 properly supported summary judgment motion must set forth specific facts demonstrating a  
11 genuine issue for trial. *Id.* Mere allegation and speculation are not sufficient to create a  
12 factual dispute for purposes of summary judgment. *Witherow v. Paff*, 52 F.3d 264, 266 (9th  
13 Cir. 1995) (per curiam). “If the evidence is merely colorable or is not significantly probative,  
14 summary judgment may be granted.” *Anderson*, 477 U.S. at 249-50, 106 S. Ct. at 2511.  
15 However, the evidence of the nonmoving party is to be believed and all justifiable inferences  
16 are to be drawn in his favor. *Id.* at 255. Further, in seeking to establish the existence of a  
17 factual dispute, the non-moving party need not establish a material issue of fact conclusively  
18 in his favor; it is sufficient that “the claimed factual dispute be shown to require a jury or  
19 judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv.*, 809  
20 F.2d 626, 631 (9th Cir. 1987).

21 Additionally, the Court is only to consider admissible evidence. *Moran v. Selig*, 447  
22 F.3d 748, 759-60 (9th Cir. 2006) (pleading and opposition must be verified to constitute  
23 opposing affidavits); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 484 (9th Cir. 1991)  
24 (declarations and other evidence that would not be admissible may be stricken). Moreover,  
25 “at the summary judgment stage, courts do not focus on the admissibility of the evidence’s  
26 form. [Courts] instead focus on the admissibility of its contents.” *Marceau v. International*  
27 *Broth. of Elec. Workers*, 618 F.Supp.2d 1127, 1141-42 (D.Ariz. 2009).

28 A "genuine" issue of "material" fact cannot be created by a party simply making

1 assertions in its legal memoranda. *Varig Airlines*, 690 F.2d at 1238. Declarations and other  
2 evidence that would not be admissible may be stricken. *FDIC v. New Hampshire Ins. Co.*,  
3 953 F.2d 478, 484 (9th Cir. 1991). Indeed, a “conclusory, self-serving affidavit, lacking  
4 detailed facts and any supporting evidence, is insufficient to create a genuine issue of  
5 material fact.” *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n. 2 (9th Cir. 2007), *citation*  
6 *omitted*. Moreover, statements must allege personal knowledge. *See Skillsky v. Lucky*  
7 *Stores, Inc.*, 893 F.2d 1088, 1091 (9th Cir. 1990) (“Like affidavits, deposition testimony that  
8 is not based on personal knowledge is hearsay is inadmissible and cannot raise a genuine  
9 issue of material fact sufficient to withstand summary judgment.”); *see also Block v. Los*  
10 *Angeles*, 253 F.3d 410, 419 n. 2 (9th Cir. 2001); *Radobenko v. Automated Equip. Corp.*, 520  
11 F.2d 540, 544 (9th Cir. 1975), *quoting Perma Research & Development Co. v. Singer Co.*,  
12 410 F.2d 572, 578 (2nd Cir. 1969) (“[i]f a party who has been examined at length on  
13 deposition could raise an issue of fact simply by submitting an affidavit contradicting his  
14 own prior testimony, this would greatly diminish the utility of summary judgment as a  
15 procedure for screening out sham issues of fact”). Additionally, the court is to review the  
16 record as a whole, but must disregard evidence favorable to the moving party that the jury  
17 is not required to believe and must give credence to the uncontradicted and unimpeached  
18 evidence of the moving party, at least ““to the extent that that evidence comes from  
19 disinterested witnesses.”” *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150-51, 120 S.Ct.  
20 2097, 2110 (2000), *citation omitted*.

21 The objections/disputes place the statements in context and clarify them. The Court  
22 overrules the objections, but will only consider the admissible evidence that is supported by  
23 specific facts that may show a genuine issue of material fact. *See Anderson*, 477 U.S. at 248,  
24 106 S.Ct. at 2510.

## 26 *Exhaustion of Administrative Remedies as Jurisdictional Requirement*

27 Defendants assert that, where state administrative remedies are adequate to protect a  
28 person’s due process rights, a person cannot state a § 1983 claim for denial of those rights

1 when he has failed to avail himself of those remedies. *Brogan v. San Mateo County*, 901  
2 F.2d 762, 764 (9th Cir. 1990); *Correa v. Nampa Sch. Dist. No. 131*, 645 F.2d 814, 817 (9th  
3 Cir. 1981). Dr. Valenzuela points out that the Ninth Circuit has stated:

4       The Supreme Court has explained that “exhaustion of state administrative remedies  
5 is not a prerequisite to an action under § 1983.” *Patsy v. Bd. of Regents*, 457 U.S.  
6 496, 507, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *see also Knight v. Kenai Peninsula*  
7 *Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir.1997) (“Congress imposed only a  
8 limited exhaustion requirement on actions brought under 42 U.S.C. § 1983, as this  
9 case was. The statute requires exhaustion only when brought by prisoners.

10 *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007). In  
11 *Patsy*, the Court concluded that exhaustion of state remedies is not required as a prerequisite  
12 to bringing a § 1983 action. Similarly, the court in *Outdoor Media Group* was addressing  
13 exhaustion as a requirement for the court’s jurisdiction. To any extent that Defendants are  
14 asserting that this Court does not have jurisdiction based on a failure to exhaust, the Court  
15 finds Dr. Valenzuela’s failure to exhaust his administrative remedies does not preclude his  
16 § 1983 claim.

#### 17 42 U.S.C. § 1983 – Unlawful Deprivation of a Property Interest without Due Process

18       The Due Process Clause of the Fourteenth Amendment provides that no State shall  
19 “deprive any person of life, liberty, or property, without due process of law.” *Richardson*  
20 *v. City and County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997). “By requiring the  
21 government to follow appropriate procedures when its agents decide to “deprive any person  
22 of life, liberty, or property,” the Due Process Clause promotes fairness in such decisions.”  
23 *Daniels v. Williams*, 474 U.S. 327, 331-332, 106 S.Ct. 662, 665 (1986). “[T]he touchstone  
24 of due process is protection of the individual against arbitrary action of government.”  
25 *Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708 (1998). “An essential principle of  
26 due process is that a deprivation of life, liberty, or property ‘be preceded by notice and  
27 opportunity for hearing appropriate to the nature of the case’” *Cleveland Bd. of Ed. v.*  
28 *Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *quoting Mullane v.*  
*Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

1       The elements of proof necessary for a claim under 42 U.S.C. § 1983 for unlawful  
2 deprivation without due process of a property interest protected under the Fifth and  
3 Fourteenth Amendments of the United States Constitution are: (1) a protectable property  
4 interest and (2) denial of adequate procedural protections. *Thornton v. City of St. Helens*,  
5 425 F.3d 1158, 1164 (9th Cir. 2005). Property interests are not created by the Constitution,  
6 “they are created and their dimensions are defined by existing rules or understandings that  
7 stem from an independent source such as state law....” *Board of Regents v. Roth*, 408 U.S.  
8 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). However, there must be a showing  
9 of a liberty or property interest that is protected by the Constitution. *Wedges, Ledges of Cal.,*  
10 *Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

11       Dr. Valenzuela asserts that, under Arizona law, he had a property interest in his  
12 tenured faculty position. *See Peacock v. Board of Regents of Universities and State Colleges*  
13 *of Arizona*, 380 F.Supp. 1081, 1087 (D.Ariz. 1974) (“It is so clear as to require no citation  
14 to authority that a tenured professor has a protected property interest.”).<sup>6</sup> Defendants do not  
15 dispute this assertion.

16       Dr. Valenzuela further asserts that his protected property interest extends not simply  
17 to continued employment but also to his right to be paid wages for the services he performed  
18 as a tenured professor. Defendants agree that it is generally true that an employee, tenured  
19 or not, has a right to wages. In fact, Defendants assert that it is undisputed that Dr.  
20 Valenzuela received his wages – each year, the University agreed to pay Dr. Valenzuela a  
21 salary that was stated in his notice of reappointment, the University issued those paychecks,  
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23       <sup>6</sup>Defendants assert that, to the extent Dr. Valenzuela claims he was deprived of a  
24 property interest in continued employment, Dr. Valenzuela has admitted he has not been  
25 terminated by the University. Dr. Valenzuela asserts that he has not claimed that he was  
26 dismissed from his job at the University. Dr. Valenzuela’s claim, as set forth in the  
27 November 6, 2008, Joint Report, is that Defendants deprived “Dr. Valenzuela of his property  
28 interest in the compensation for his services of teaching and research as provided by the state  
salary line assigned to his tenured position by entirely eliminating for the fiscal year 2007-  
2008 the total compensation that Dr. Valenzuela received for his services of teaching and  
research.” Joint Report, p. 3.

1 and the compensation Dr. Valenzuela received provided him with the entire salary specified  
2 in his notice of reappointment. Defendants argue that this evidence precludes summary  
3 judgment in favor of Dr. Valenzuela on his claim that he was deprived of wages.

4 Dr. Valenzuela asserts that the United States Supreme Court has made it clear that a  
5 person's interest in a benefit is a protected property interest:

6 We have made clear . . . that 'property' interests subject to procedural due process  
7 protection are not limited by a few rigid, technical forms. Rather, 'property' denotes  
8 a broad range of interests that are secured by 'existing rules or understandings.' A  
9 person's interest in a benefit is a 'property' interest for due process purposes if there  
10 are such rules or mutually explicit understandings that support his claim of  
11 entitlement to the benefit and that he may invoke at a hearing.

12 *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972), *citations omitted*. He  
13 also asserts that Arizona has repeatedly held that wages are a property interest protected by  
14 the due process clause. *Piatt v. MacDougall*, 773 F.2d 1032, 1036, 1037 (9th Cir. 1985)  
15 ("[b]ecause Arizona has established, by statute, a right of inmates to compensation for work  
16 performed for private parties, it cannot deny that right to Piatt after he has earned the wages,  
17 without affording him due process of the law[;]" "[the] state was under a constitutional  
18 obligation not to deny Piatt his wages without affording him a meaningful opportunity to be  
19 heard at the time the wages were due").

20 Dr. Valenzuela asserts that the United States Court of Appeals for the Ninth Circuit  
21 has held that "[t]his standard does not require specific binding precedent to show that a right  
22 is clearly established." *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir.1987), *cert. denied*,  
23 486 U.S. 1033, 108 S.Ct. 2016, 100 L.Ed.2d 603 (1988). The protected property interest in  
24 employment clearly includes the wages from that employment. *See e.g. Piatt* (inmates have  
25 a property right to receive a minimum wage); *Hale v. State of Ariz.*, 967 F.2d 1356, 1371 (9th  
26 Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir.1991) (property  
27 right to wages where the requirements of Arizona law for receiving minimum wages is met).

28 Defendants assert that, although Dr. Valenzuela does not mention it in his argument,  
he is apparently claiming that he was deprived of a "state salary line." Defendants interpret  
Dr. Valenzuela's position as that he performs teaching and research services for the

1 University and clinical services for UPH. In his view, any compensation he receives for  
2 teaching and research must come from state sources while compensation for clinical work  
3 must come from UPH. Defendants asserts that this compartmentalization ignores the fact  
4 that, like other physician faculty members, Dr. Valenzuela is obligated to join UPH as a  
5 condition of his employment with the University because he is providing health care  
6 services.<sup>7</sup> Further, as a member of UPH and of the COM, Dr. Valenzuela works regular  
7 shifts as an attending physician in the UMC Emergency Department. Defendants asserts  
8 that, in that capacity, Dr. Valenzuela is involved in patient management and interactive  
9 instruction of residents and students, has teaching responsibilities every time he works a shift  
10 in the Emergency Department (which is his classroom) . . . Defendants assert that Dr.  
11 Valenzuela's clinical responsibilities and his teaching responsibilities are inextricably  
12 intertwined. Defendants assert that Dr. Valenzuela receives a paycheck from the University  
13 to compensate him for the services he performs and there is no distinction drawn between  
14 compensation for clinical services and compensation for teaching and research.

15 Dr. Valenzuela disputes these assertions of Defendants and asserts that it is clearly  
16 established that physicians employed by the ABOR to teach and to conduct research as  
17 faculty of the COM are not state employees when providing health care services to the  
18 public:

19 University Physicians, Inc. ("UPI") is a nonprofit corporation formed in 1984. UPI  
20 employs physicians ("Physicians") who provide health care services to the public.  
21 Physicians also are employed by the State of Arizona Board of Regents to teach and  
to conduct research as faculty of the University of Arizona College of Medicine.

22 As employees of the Board of Regents, Physicians are provided liability insurance  
coverage pursuant to A.R.S. sections 41-621 to -625 (1992 & Supp.1993) when acting  
23 as state employees.FN1 Until July 1, 1993, Physicians also were provided liability  
insurance coverage for acts or omissions in providing health care services to the  
24 public even though they were not acting as state employees.

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25 <sup>7</sup>A review of Policy 6-212, upon which Defendants rely for their assertion, does not  
26 establish that Dr. Valenzuela was obligated to join UPH. Rather, the Policy provides that  
27 faculty members may also provide health care services at a veterans administration hospital.  
28 However, the policy makes clear that Tucson faculty who provide health care services, with  
a few exceptions, are to provide those health care services through UPH.

1 FN1. In this case, Physicians are acting as state employees when they teach or  
2 conduct research. They are acting in a private capacity when performing  
clinical duties for the public.

3 *State, Dept. of Administrative Risk Management Div. v. University Physicians, Inc.*, 182 Ariz.  
4 262, 263, 895 P.2d 1025, 1026 (App. 1994). However, in *University Physicians*, the court  
5 specifically stated that the capacities in which the physicians were working were “in this  
6 case.” Furthermore, *University Physicians* did not address how, in each of those capacities,  
7 the physicians were compensated. The Court finds that *University Physicians* does not  
8 establish that physicians employed by the ABOR to teach and to conduct research as faculty  
9 of the COM receive a specified separate compensation for those services.

10 Dr. Valenzuela asserts that Defendants deprived him of a property interest he had in  
11 his employment with ABOR as a tenured professor when they stopped his payment by  
12 ABOR for the research and teaching duties he performed in his employment with ABOR.  
13 He asserts it is irrelevant to his claim whether his other employer, UPH, continued to pay him  
14 for the clinical duties he performed in his employment with UPH or whether UPH gave him  
15 a raise because of the revenues he was generating from his clinical duties. Rather, Dr.  
16 Valenzuela asserts that he had a property interest in being compensated for his services of  
17 teaching and research in his tenured faculty position which was the entire salary he received  
18 as an employee of ABOR and that Defendants deprived Dr. Valenzuela of that property  
19 interest by entirely eliminating the total compensation that he received for his services of  
20 teaching and research.<sup>8</sup>

21 Defendants assert that the primary inquiry in determining whether he had a sufficient  
22 expectation of receiving state funding to create a property interest depends on the extent to  
23 which there is a relevant rule or statute restricting the discretion of the decisionmaker. *See*  
24 *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 758-60 (2005) (holding that plaintiff  
25 had no protectable property interest in police enforcement of restraining orders because under  
26

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27 <sup>8</sup>Dr. Valenzuela’s claim is that his entire teaching and research salary was eliminated,  
28 not that it was reduced.

1 state law police retained discretion); *Allen v. City of Beverly Hills*, 911 F.2d 367, 370 (9th Cir.  
2 1990). If “the decision to confer a benefit is unconstrained by ‘particularized standards or  
3 criteria,’ no entitlement exists.” *Id.*, citations omitted.

4 Defendants assert that Dr. Valenzuela has not identified any statute or policy that  
5 regulates how state dollars are used or must be used in the COM or the DEM. Rather, he  
6 admitted that he knows of no University or ABOR policy that guarantees that a specific sum  
7 or percentage of his pay would come from state dollars. Further, Dr. Meislin testified that  
8 when he became head of DEM, there were no guidelines or policies concerning the use of  
9 state dollars to support faculty salaries, and that state dollars were not reserved for any  
10 particular purpose or particular faculty members. Defendants also point out that Dr.  
11 Valenzuela himself once remarked that Dr. Meislin “could do pretty much whatever he  
12 wants” with the state dollars and then added, “So what? We’ve always done it that way.”  
13 DSOF, ¶¶ 37-38.

14 In support of his claims that UPH provided compensation for clinical services and did  
15 not compensate him for teaching and research services, Dr. Valenzuela relies on his own  
16 assertions in his affidavit. Furthermore, Dr. Valenzuela’s affidavit relays a conversation  
17 between himself and Dr. Meislin:

18 When Dr. Valenzuela inquired of his COM Department Head in 2007 regarding the  
19 decision to deprive Dr. Valenzuela of the entire salary for the teaching and research  
20 services he performs for ABOR as a tenured Professor at COM, he was told by  
21 Defendant Harvey W. Meislin, M.D., that the decision was made by the Dean.

22 Plaintiff’s Statement of Fact, Ex. 1, ¶ 20. Because Dr. Valenzuela’s question contained a  
23 presupposition, it is unclear if Dr. Meislin was agreeing that Dr. Valenzuela had been  
24 deprived of his teaching and research salary and that the decision had been made by Dr.  
25 Joiner or if Dr. Meislin was only stating that salary decisions were made by Dr. Joiner.

26 In the context of false testimony/oath charges, some courts have determined that,  
27 “[a]bsent fundamental ambiguity or impreciseness in the questioning, the meaning and  
28 truthfulness of declarant’s answer is for the jury.” *United States v. Robbins*, 997 F.2d 390,  
395 (8th Cir. 1993), citing *United States v. Wolfson*, 437 F.2d 862, 878 (2nd Cir. 1970).



1 However, in this case, other statements of Dr. Valenzuela raise questions as to the  
2 presupposition in Dr. Valenzuela's statement. Indeed, Dr. Valenzuela testified at deposition  
3 that he did not believe he was guaranteed the same amount in state dollars every year, he did  
4 not know of any ABOR policy that guaranteed him a particular sum of state dollars, he did  
5 not know of any University policy that guaranteed him a particular sum of state dollars, he  
6 did not know of any ABOR policy that guaranteed that a specific percentage of his salary  
7 would come from state dollars, he did not know of any University policy that guaranteed that  
8 a specific percentage of his salary came from state dollars, and he did not know of any  
9 ABOR or University policy that required that compensation for his University activities  
10 come solely from state dollars. Dr. Valenzuela also testified that Dr. Meislin, as department  
11 head, had the power to do what he wanted with the state dollars and other funds the  
12 department he received.

13 The Court considers that Dr. Valenzuela's affidavit, including reference to the  
14 discussion with Dr. Meislin, lacks any factual details or supporting evidence to establish that  
15 UPH only provided compensation for clinical services and did not compensate him for  
16 teaching and research services. *See Nilsson*, 503 F.3d at 952 n. 2; *see also Skillsky*, 893 F.2d  
17 at 1091.

18 Similarly, the evidence presented by Defendants is through deposition testimony of  
19 a party (Dr. Meislin), who was actually responsible for distribution of compensation to Dr.  
20 Valenzuela and others:

21 Q: Is there a breakdown between the payment that comes as an employee of UPH  
22 and the payment that comes as an employee of University of Arizona?

23 A: Very dynamic, changes almost every year for every faculty member.

24 Q: Okay. And is that breakdown based in any way on the services that the doctor  
25 provides for UPH as distinct from the services the doctor provides for the University  
26 of Arizona?

26 A: Not necessarily, because a service to University of Arizona may flow through  
27 a UPH account. For example, we get some trauma readiness funds that used to come  
28 through a UPH account prior to about two years ago, now runs through – same fund  
of money now runs through a U of A account.

We've had certain hospital contracts that have run through UPH and now run through

1 U of A, and vice versa. We've had contracts that – so there was a – there's always  
2 just kind of some definition of what a – why an account – why a fund should run  
3 through a UPH account versus a U of A account, and it kind of comes down into  
4 whether you need malpractice insurance to function in that role.

5 There's also money that becomes, I guess, somewhat discretionary on my part, that  
6 as department chair I have funding that may run through a UPH account, it may  
7 through a U of A account, and I can give it to people to try to enhance their year-end  
8 balance, their salary, and I have discretion over those dollars.

9 Q: So there is no amount that represents the salary that a person receives for their  
10 services as a University of Arizona professor –

11 A: No.

12 Q: – as distinct from a UPH employee?

13 A: No, it's never been my understanding that there is a – either a guaranteed or  
14 a fixed sum of dollars that relates to a professorial appointment.

15 Q: Is there any payment at all that's identified as this is your payment as a  
16 University of Arizona professor as distinct from a UPH employee?

17 A: Well, the accounts identify the source of the funding, whether it would be a  
18 state account or whether it would be a University Physicians account, and I guess  
19 within that it would – it would be sub-identified as what type of state account or what  
20 type of University Physicians account.

21 Q: Would it be accurate to say that the money that comes from the 900150 relates  
22 to the work that the doctor performs as a clinical practitioner as distinct from the  
23 teaching and research roles that they perform as a U of A professor?

24 A: No, sir. They're intermingled. And again, it depends on whether the funds  
25 flow through. So, for example, we have graduate medical education funding that  
26 comes into the department through a UPH account, not a U of A account, and we have  
27 graduate medical education funding that comes through a U of A account, not a UPH  
28 account. So that distinction, that fine line, doesn't exist.

Q: So the faculty member doing teaching might be getting aid with UPH funds to  
do the teaching?

A: Yes.

DSOF, Ex. 2, 19:2-21:14; *see also* DSOF, Ex. 3, 9:20-24, 12:1-4 (Dr. Joiner's deposition).

Additionally, Dr. Meislin stated in an affidavit that he had broad discretion in allocating  
funding from various sources to benefit the DEM faculty. Defendants' Response to  
Plaintiff's Statement of Facts ("DRPSOF"), Ex. 2, ¶ 11. Dr. Meislin's testimony indicates  
there is no set ABOR or University policy as to what funding is used to pay for teaching and  
research services.

1       The parties have presented self-serving statements to support their positions.  
2       However, Defendants' statements are also made as the administrators responsible for making  
3       compensation decisions. Dr. Valenzuela's statement to Dr. Viscusi that Dr. Meislin "can  
4       pretty much do whatever he wants with much of the 'new' state money the department will  
5       receive for teaching. So what? We've always done it that way[.]" DSOE, Ex. 13, indicates  
6       that Dr. Valenzuela recognized the discretionary nature of the source of compensation and  
7       that it was the established practice. Additionally, the lack of any policy that regulates the  
8       allocation of funding, in and of itself, supports a reasonable inference that the decisions  
9       regarding the allocation of funding are discretionary. While evidence of a nonmoving party  
10      is to be believed and all justifiable inferences are to be drawn in his favor, *Anderson*, 477  
11      U.S. at 255, the relevant facts are to be determined and inferences drawn in favor of  
12      nonmoving party "*to the extent supportable by the record[.]*" *Scott v. Harris*, 550 U.S. 372,  
13      127 S.Ct 1769, 1776 n. 8, 167 L.Ed.2d 686 (2007). Summary judgment is appropriate where  
14      there is no legally sufficient evidentiary basis for a reasonable jury to find for a nonmoving  
15      party. Fed.R.Civ.P. 56(c). Judgment as a matter of law is appropriate where there is no  
16      legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party.  
17      Fed.R.Civ.P. 50(a).

18      Where, as here, a plaintiff has not provided any facts (other than his self-serving,  
19      conclusory statements) to support a proposition (i.e., that Dr. Valenzuela had a property  
20      interest in receiving compensation from a specific state fund) essential to his claim, the Court  
21      cannot find that there is an evidentiary basis for a reasonable jury to find in his favor.  
22      Defendants have presented evidence that Dr. Valenzuela cannot identify any University or  
23      ABOR policy supporting his claim that UPH did not compensate him for teaching and  
24      research services. Dr. Valenzuela has not set forth specific facts disputing this; therefore, Dr.  
25      Valenzuela has not shown a genuine issue for trial is presented. *See Anderson*, 477 U.S. at  
26      248 (once moving party has met its burden demonstrating absence of genuine issue of  
27      material fact, opposing party may not rest on mere allegations or denials in the pleadings, but  
28      must set forth specific facts showing that there exists a genuine issue for trial); *see also*

1 *Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct.  
2 1348, 1356, 89 L.Ed.2d 538 (1986) (to resist summary judgment, non-moving party “must  
3 do more than simply show there is some metaphysical doubt as to the material facts”). While  
4 Dr. Valenzuela need not show that a right is clearly established, *Ostlund*, 825 F.2d at 1374,  
5 Dr. Valenzuela has not shown any relevant rule or statute restricting the discretion of Dr.  
6 Meislin such that a genuine issue for trial has been presented. *See Castle Rock*, 545 U.S. at  
7 758-60; *Allen*, 911 F.2d at 370. A factual dispute that requires a jury or judge to resolve the  
8 parties’ differing versions of the truth at trial has not been established. *See T.W. Elec. Serv.*,  
9 809 F.2d at 631. The Court finds there is no genuine issue of material fact that Dr.  
10 Valenzuela was entitled to receive payment from state funds to compensate him for his  
11 teaching and research services has been presented. *See Allen*, 911 F.2d at 370 (if “the  
12 decision to confer a benefit is unconstrained by ‘particularized standards or criteria,’ no  
13 entitlement exists”), *citations omitted*. Accordingly, no genuine issue of material fact that  
14 Dr. Valenzuela was deprived of a property interest has been presented. Summary judgment  
15 in favor of Defendants on this basis is appropriate.

### 16 17 *Qualified Immunity*

18 Defendants also assert that they are entitled to summary judgment on the basis of  
19 qualified immunity. Government officials are entitled to qualified immunity “insofar as their  
20 conduct does not violate clearly established statutory or constitutional rights of which a  
21 reasonable person would have known.” *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th  
22 Cir. 1997), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d  
23 396 (1982). The defense of qualified immunity allows for errors in judgment and protects  
24 “all but the plainly incompetent or those who knowingly violate the law . . . [I]f officers of  
25 reasonable competence could disagree on the issue [whether or not a specific action was  
26 constitutional], immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341, 106  
27 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). Qualified immunity balances the interests of “the  
28 need to hold public officials accountable when they exercise power irresponsibly and the

1 need to shield officials from harassment, distraction, and liability when they perform their  
2 duties reasonably.” *Pearson v. Callahan*, — U.S. — , 129 S.Ct. 808, 815, 172 L.Ed.2d 565  
3 (2009). The Court must determine "whether, in light of clearly established principles  
4 governing the conduct in question, the [public officer] objectively could have believed that  
5 his conduct was lawful." *Watkins v. City of Oakland*, 145 F.3d 1087, 1092 (9th Cir. 1998).

6 When qualified immunity is asserted at the summary judgment stage, the Court would  
7 historically consider "this threshold question: Taken in the light most favorable to the party  
8 asserting the injury, do the facts alleged show the officer's conduct violated a constitutional  
9 right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001);  
10 *see also Billington v. Smith*, 292 F.3d 1177, 1183 (9th Cir. 2002). If not, then "there is no  
11 necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201, 121  
12 S.Ct. at 2156. If a constitutional violation is revealed, the "the next, sequential step is to ask  
13 whether the right was clearly established." *Id.* A constitutional right is clearly established  
14 when "it would be clear to a reasonable officer that his conduct was unlawful in the situation  
15 he confronted." *Id.*, 533 U.S. at 202, 121 S.Ct. at 2156. If a constitutional violation  
16 occurred, the issue becomes whether the law officer could have reasonably believed that the  
17 officer's conduct was lawful. Generally, this is a mixed question of law and fact requiring  
18 a determination regarding whether an objectively reasonable officer would have believed that  
19 exigent circumstances existed to justify the force used in light of the information possessed  
20 by defendant. *Id.*, 533 U.S. at 205-206, 121 S.Ct. at 2158-2159. However, the United States  
21 Supreme Court recently determined that the sequence set forth in *Saucier* is not mandatory  
22 and that district courts may “exercise their sound discretion in deciding which of the two  
23 prongs of the qualified immunity analysis should be addressed first in light of the  
24 circumstances in the particular case at hand.” *Pearson*, 129 S.Ct. at 818.

25 Any genuine issues of material fact concerning the underlying facts of what the public  
26 official knew or what the public official did are questions of fact for the jury. *Acosta v. City*  
27 *and County of San Francisco*, 83 F.3d 1143, 1149 (9th Cir. 1996), citing *Sinaloa Lake*  
28 *Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995). However, where

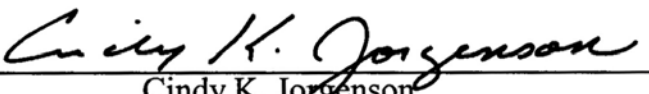
1 the essential facts are undisputed, the reasonableness of the public official's actions is  
2 properly determined by the court. *Sinaloa Lake Owners Ass'n*, 70 F.3d at 1099. In this case,  
3 the essential facts are undisputed.

4 The Court's determination that a genuine issue of material fact that Dr. Valenzuela  
5 was deprived of a property interest has not been presented, *see Castle Rock*, 545 U.S. at  
6 758-60; *Allen*, 911 F.2d at 370, is sufficient to establish that Defendants are entitled to  
7 qualified immunity. Given the undisputed facts of this case (i.e., there is no University or  
8 ABOR policy that establishes where funding for compensation for teaching and research  
9 services comes from) and in light of the clear consensus that Dr. Meislin could "pretty much  
10 do whatever he want[ed]" with the funds, DSOF, Ex. 13, a reasonable person in Defendants'  
11 positions could have believed that their conduct was lawful. *See Watkins*, 145 F.3d at 1092.  
12 Under either *Saucier* prong, therefore, Defendants are entitled to qualified immunity. The  
13 Court finds Defendants are entitled to summary judgment on this basis.

14  
15 Accordingly, IT IS ORDERED:

- 16 1. Plaintiff's Motion for Partial Summary Judgment [Doc. # 25] is DENIED.
- 17 2. Defendants' Cross-Motion for Summary Judgment [Doc. # 28] is GRANTED.
- 18 3. Judgment is awarded in favor of Defendants and against Plaintiff.
- 19 4. The Clerk of the Court shall enter judgment and shall then close its file in this  
20 matter.

21 DATED this 30th day of October, 2009.

22  
23   
24 Cindy K. Jorgenson  
25 United States District Judge  
26  
27  
28